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# Ontario Weekly Notes

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[APPELLATE DIVISION.]

FIRST DIVISIONAL COURT. MAY 15TH, 1916.

## JONES & MOORE ELECTRIC CO. v. BATEMAN.

*Contract—Sale of Machine Manufactured by Plaintiffs—Action for Balance of Price—Performance of Contract—Evidence—Findings of Trial Judge—Appeal—Judgment Varied by Ordering Delivery of Machine.*

Appeal by the defendants from the judgment of the Senior Judge of the County Court of the County of York, in an action in that Court, brought to recover the balance of the price of a machine manufactured by the plaintiffs, upon the order of the defendants. The judgment was in favour of the plaintiffs for the recovery of $351.84 and costs, and dismissing the defendants' counterclaim with costs.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

W. H. Clipsham, for the appellants.

R. McKay, K.C., for the plaintiffs, respondents.

GARROW, J.A., reading the judgment of the Court, said that a careful perusal of the evidence left him quite unconvinced that the judgment was erroneous. There was in fact but one contract and one performance. It was possible that the plaintiffs might have maintained the action after the delivery of the first machine, which seemed to have been manufactured in accordance with the written order given by the defendants, although it afterwards, through no fault of the plaintiffs, proved to be too powerful for the service in which the defendants wished to use it. But, by the consent of all parties, the machine for the price of which this action was brought was afterwards manufactured and delivered in place of the first machine. And the latter, the learned County Court Judge found, upon what appeared to be sufficient evidence, was a full and satisfactory performance of their contract on the part of the plaintiffs, with the result that they had earned and were entitled to payment from the defendants.

The plaintiffs, must, however, upon payment, deliver the machine to the defendants, and the judgment should be amended so as thus to direct.

The appeal should be dismissed with costs.

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FIRST DIVISIONAL COURT. MAY 15TH, 1916.

## DRAIN v. CATHOLIC MUTUAL BENEFIT ASSOCIATION OF CANADA.

*Insurance—Life Insurance—Benefit Society—Assessment Rates—Power of Trustees—4 & 5 Geo. V. ch. 136 (D.)—Increased Rates—Paid-up Policies—Cash Surrender Value Scheme.*

Appeal by the defendants and cross-appeal by the plaintiff from the judgment of MIDDLETON, J., ante 104.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

Christopher C. Robinson, for the defendants.

D. O'Connell, for the plaintiff.

The judgment of the Court was read by HODGINS, J.A., who said that he entirely agreed with the judgment below as to the matters in question upon the plaintiff's appeal, and had nothing to add to the reasons of Middleton, J. That appeal should be dismissed with costs.

With regard to the declaration that it was not competent for the trustees to issue paid-up policies based on table No. 5, Hodgins, J.A., said that he had not been able to arrive at the same conclusion as Middleton, J. Section 20 of the association's Act, as enacted by 4 & 5 Geo. V. ch. 136 (D.), provides: "To make the association actuarially solvent the grand trustees in the name of the association may make any contract with its members for increasing the rates, reducing the amount payable on certificates of insurance . . . as they may deem necessary in the interests of the association." Making a contract for a paid-up policy payable on the death of the insured reduces (as shewn by the tables) the amount payable on a certificate then held by him, and comes literally within the wording of the Act.

The point is, that the entire insurance liability will be made up by the acceptance by the members of one or other of three options; and, if the first of the options is sound, and the others are said to rest upon the same basis and to be also actuarially sound, they are

not open to objection, provided the power to offer them to members is given by the statute.

The scheme, including the options, is recommended by the actuary and accepted by the trustees as being sound and reasonable. It would be a misfortune if the Court were to interfere with something which comes literally within the powers conferred by the Act, and forms part of a well thought-out and matured insurance scheme, upon the theory that no reserve fund equivalent to the present liability under paid-up policies exists. To enable a Court to come to that conclusion, it would be necessary to have it demonstrated beyond any reasonable doubt that the actuarial basis for the tables was incorrect, and that had not been done.

The appeal of the defendants as to the paid-up policies should be allowed with costs.

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FIRST DIVISIONAL COURT. MAY 15TH, 1916.

## COFFEY v. DIES.

*Negligence—Collision of Motor Vehicles on Highway—Evidence—Rule of Road—No Reasonable Evidence of Negligence of Defendant, either Primary or Ultimate—Jury—Nonsuit.*

Appeal by the defendant from the judgment at the trial, before a Judge of the County Court of the County of York and a jury, in favour of the plaintiff, in an action brought to recover damages said to have been caused to the plaintiff while riding on a motorcycle with side-seat attachment, on the Kingston Road, Toronto, by colliding with the motor vehicle of the defendant.

The appeal was heard by GARROW, MACLAREN, MAGEE, and HODGINS, JJ.A.

A. A. Macdonald, for the appellant.

D. J. Coffey, for the plaintiff.

GARROW, J.A., read the judgment of the Court. He said that the sole question upon the appeal was, whether there was evidence upon which the jury, acting reasonably, could find, as they did, that, after the plaintiff's condition became apparent, the defendant could, by proper management of his machine, have avoided the collision.

It is found, in accordance with the evidence, that the plaintiff was at the time of the collision upon the wrong side of the highway. If he had not been, the accident would not have happened. According to the evidence, the plaintiff, when approaching the

place of meeting, was for a time not looking ahead, but was looking down at his machine, and it was during that time that his machine apparently swerved diagonally across the road. He, however, did finally look up, and, when he did, saw the defendant's approach, when they were about at least 150 feet apart. He never regained his proper side of the road, and, in his effort to escape from his dangerous position, finally overturned his machine, and, while in that position, came in contact with the defendant's motor-car, and was severely injured.

The plaintiff deposed that he was proceeding on his own proper side when he saw the defendant approaching, and that the defendant was on the wrong side. At about twenty-five feet apart, the plaintiff said, the defendant seemed to be reducing his speed, and the plaintiff then turned to the left (his wrong side) going towards the north-east, because there did not seem room enough on the proper or south side to pass. He proceeded eight or ten feet in that direction, "and I lost control of my machine, because she tilted . . . to the south towards the automobile which was coming . . . I was about half way off my machine when the automobile hit me."

He had therefore, apparently, on his own shewing, quite crossed from the south side (his proper side while proceeding, as he was, toward the east), and was upon the north side when his machine tilted him towards the defendant's machine.

The jury did not apparently accept the plaintiff's account of his position, and it was quite contrary to the weight of the evidence. The evidence really left no room for doubt, and was practically uncontradicted, that he was for a time not attending to the guidance of his machine, during which time he had deviated from his proper course upon the highway, thus inviting the collision which followed.

There was no reasonable evidence, proper for the jury, of negligence, either primary or ultimate, on the part of the defendant, and the action should have been dismissed at the trial.

That should now be done, and the appeal allowed, both with costs.

*Appeal allowed.*

## HIGH COURT DIVISION.

MIDDLETON, J. MAY 16TH, 1916.

## *ANSELL v. BRADLEY.

*Mortgage—Exercise of Power of Sale—Notice of Sale—Absence of Signature—Fatal Defect—Absence of Address—Service on Mortgagor—Sale Set aside—Rights of Purchaser against Mortgagee.*

Action to set aside a sale, by the defendant Bradley to the defendant Eckhardt, of land mortgaged by the plaintiff to the defendant Bradley, under the power of sale contained in the mortgage-deed.

The power of sale was in the statutory form—the mortgagee on default for one month may on one month's notice enter on and lease or sell the mortgaged land. The extended form enables the power to be exercised "after giving written notice to the said mortgagor," etc.

The defendant Bradley served written notice on the plaintiff, beginning "I hereby require payment," etc., and concluding, "unless payment is made by the 16th December, 1914, I shall sell the property comprised in the said mortgage." In the body of the notice, the mortgage was sufficiently recited, the names of the mortgagor and mortgagee and the date of registration being given; but there was nothing in the notice to shew that it was given by the mortgagee, not was it addressed to the mortgagor; and there was no signature to it.

The action was tried without a jury at Toronto.

S. H. Bradford, K.C., for the plaintiff.

T. P. Galt, K.C., for the defendant Bradley.

G. H. Watson, K.C., for the defendant Eckhardt.

MIDDLETON, J., after setting out the facts in a written opinion, said that, as the notice was given to the plaintiff, the circumstance that it was not addressed to her, was not fatal: Doe ex dem. Matthewson v. Wright (1801), 4 Esp. 5.

But the absence of the signature of the mortgagee was fatal: it is not essential that the signature should appear at the foot or end of the notice, but it is essential that the identity of the person giving the notice should in some way sufficiently appear in the notice itself, and that the notice should be a completed, and not an obviously incomplete, document.

*This case and all others so marked to be reported in the Ontario Law Reports.

Reference to Fenwick v. Whitwam (1901), 1 O.L.R. 24; Lockhart v. Yorkshire Guarantee and Securities Corporation (1908), 14 B.C.R. 28; Union Steamship Co. of New Zealand v. Melbourne Harbour Commissioners (1884), 9 App. Cas. 365; Eaton v. Supervisors of Manitowoc County (1877), 42 Wis. 317; Demelt v. Leonard (1860), 19 How. Pr. (N.Y.) 182; Regina v. Justices of Kent (1873), L.R. 8 Q.B. 305; Carleton v. Herbert (1866), 14 W.R. 772.

The sale should be set aside, and it should be declared that the notice is not a sufficient notice under the power of sale. The plaintiff should have her costs, to be set off against the mortgage-debt pro tanto. The defendant Bradley should pay his co-defendant his costs of the action and refund the sale-deposit.

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CLUTE, J. MAY 17TH, 1916.

## *KUUSISTO v. CITY OF PORT ARTHUR AND PUBLIC UTILITIES COMMISSION OF PORT ARTHUR.

*Street Railway—Injury to Vehicle on Highway—Railway Owned and Operated by Municipal Corporation—Negligence—Nuisance—Construction and Operation of Railway—Limitation of Time for Bringing Action—Municipal Act, sec. 460 (2)—Public Utilities Act, sec. 29—Public Authorities Protection Act, sec. 13—Ontario Railway Act, sec. 265—Notice of Claim—Sufficiency.*

Action for damages for injuries to the plaintiff's automobile by its being run into while stalled in the highway by a car of the Port Arthur and Fort William Electric Railway, owned by the defendant city corporation and operated or managed by the defendant commission.

The action was tried without a jury at Port Arthur.

J. Reeve, for the plaintiff.

W. F. Langworthy, K.C., for the defendants.

CLUTE, J., stated the facts in a written opinion, and said that he found the defendants guilty of negligence which caused the injury to the plaintiff's automobile, and assessed the damages at $650.

The principal defences were, that the notice of claim given on behalf of the plaintiff was insufficient, and that the action was brought too late.

The notice was a letter written by the plaintiff's solicitor to the city corporation, on the day of the injury, as follows: "I am instructed by Messrs. Kuusisto & Sunberg to claim damages from you for the smashing of their automobile by car number 46 on Cumberland street north this morning. I am writing you at this early date so that you may have notice of the claim to be in a position to institute the necessary inquiries." On the 17th June, the defendants' Commissioner of Utilities answered: "We have had a report of this from the street railway department and find that there was no negligence on the part of the employees, and therefore cannot consider your claim."

The learned Judge said that the notice was sufficient under the statute, if notice were necessary.

The accident occurred on the 3rd June, 1914, and this action was begun on the 24th April, 1915. The defendants contended that the action was barred by sec. 460 (2) of the Municipal Act, R.S.O. 1914 ch. 192; or by sec. 29 of the Public Utilities Act, R.S.O. 1914 ch. 204; or by sec. 13 of the Public Authorities Protection Act, R.S.O. 1914 ch. 89—because not brought within three or six months from the time of the injury.

The plaintiff contended that these statutes had no application; and that the case was governed by the Ontario Railway Act, R.S.O. 1914 ch. 185, sec. 265, which allows a year for the commencement of the action.

Reference to Glynn v. City of Niagara Falls (1913-4), 29 O.L.R. 517, 31 O.L.R. 1; Parker v. London County Council, [1904] 2 K.B. 501; The Ydun, [1899] P. 236; Lyles v. Southend-on-Sea Corporation, [1905] 2 K.B. 1; Fielding v. Morley Corporation, [1899] 1 Ch. 1.; Jeremiah Ambler & Sons Limited v. Bradford Corporation, [1902] 2 Ch. 585, 594; Attorney-General v. Margate Pier and Harbour Co., [1900] 1 Ch. 749, 752; Milford Docks Co. v. Milford Haven Urban District Council (1901), 65 J.P. 483, 484; The Johannesburg, [1907] P. 65, 72.

The learned Judge said that no one of the three statutory provisions relied on by the defendants was applicable.

In constructing the road, a nuisance, which had continued ever since, was created; and this action, being for damages for the injury sustained by reason of the improper construction and operation of the railway, fell expressly within sec. 265 of the Railway Act.

The title of an Act of Parliament is now to be read as forming part of it, as shewn by some of the cases above-cited.

Judgment for the plaintiff for $650 with costs.

UNION MACHINE CO. v. CANADIAN FLAX MILLS LIMITED—SUTHERLAND, J., IN CHAMBERS—MAY 15.

*Jury Notice—Application to Judge in Chambers to Strike out—Rule 398—Questions of Law and Complicated Facts—Delay in Going to Trial.*]—Application on behalf of the plaintiffs, under Rule 398, to strike out the jury notice served by the defendants. The learned Judge said that a perusal of the pleadings indicated a case in which not only various questions of law would arise, but in which very complicated questions of fact would have to be disposed of, with the possibility of a reference as to the accounts between the parties, in case the plaintiffs should be successful. It did not appear at all likely that any Judge would be disposed to try the case with a jury. While there had perhaps been some delay on the part of the plaintiffs in getting the action down to trial, it was now represented that the result of allowing the jury notice to stand would be that the case would not be heard until after vacation. The action was to be heard at St. Catharines, and the jury sittings there was over. The date originally fixed for the non-jury sittings for St. Catharines was the 17th May, 1916, but this had been changed to the 19th June, 1916. In all the circumstances, the jury notice should be struck out; costs in the cause. A. W. Langmuir, for the plaintiffs. H. D. Gamble, K.C., for the defendants.

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RE NEWCOMBE v. EVANS—SUTHERLAND, J., IN CHAMBERS—MAY 15.

*Surrogate Courts—Removal of Testamentary Cause into Supreme Court of Ontario—Refusal of Motion—Leave to Appeal—Rule 507.*]—Motion by the defendant, under Rule 507, for leave to appeal from the order of LATCHFORD, J., in Chambers, ante 221, refusing the defendant's application for the transfer of the action from the Surrogate Court of the County of Essex to the Supreme Court of Ontario. SUTHERLAND, J., said that the matters raised appeared to be so important and substantial that the leave asked should be granted. A. W. Langmuir, for the defendant. H. S. White, for the plaintiff.

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HARVEY v. CITY OF TORONTO—SUTHERLAND, J., IN CHAMBERS—MAY 15.

*Particulars—Statement of Claim—Wrongful Acts of Defendants.*]—Appeal by the plaintiff from an order of the Master in Chambers directing the plaintiff to deliver to the defendants particulars

of how the acts of the defendants in changing the grade of Bloor street, as alleged in paragraph 4 of the plaintiff's statement of claim, were done "wrongfully" as therein alleged. SUTHERLAND, J., said that, if the word "wrongfully" in para. 4 of the statement of claim meant "without legal right or authority," then, as the action taken by the defendants and the ground therefor was within their knowledge, this was a case in which particulars ought not to be ordered: Holmested's Judicature Act, 5th ed., p. 581, and cases cited. The defendants did not need particulars in order to enable them to plead, nor could they be in any way prejudiced by not obtaining particulars. The plaintiff might well be unable to give any, at all events until after an examination for discovery. The order should be set aside. See Smith v. Reid (1909), 17 O.L.R. 265; Townsend v. Northern Crown Bank (1910), 1 O.W.N. 69, 19 O.L.R. 489; Mulvenna v. Canadian Pacific R.W. Co. (1914), 5 O.W.N. 779. Costs in the cause to the plaintiff.

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REX v. BAUGH—SUTHERLAND, J., IN CHAMBERS—MAY 16.

*Criminal Law—Application for Removal of Indictment from Sessions to Assizes—Postponement of Trial—Effect of.*]—Motion by the accused to remove a certain indictment against the defendant from the Court of General Sessions of the Peace for the County of York to the next sittings of the Court of Assize (Oyer and Terminer) at Toronto. The grounds alleged in the notice of motion were, possible bias and prejudice on the part of the Senior County Court Judge, and the inability of senior counsel to be present owing to other important engagements. In the affidavit of the accused he also suggested, in an indefinite sort of way, that there were certain witnesses whom he was endeavouring to find, but did not expect to be able to do so for some little time. A similar application was made to the Senior County Court Judge, and refused. The trial of the accused was fixed for the 18th May. SUTHERLAND, J., said that it appeared more than probable that a delay of the hearing until the autumn might make it difficult, if not impossible, for the Crown to secure witnesses now available. Even if the learned Judge had the power to do so, he did not think, upon the material before him, that it would be proper for him to make the order asked. I. F. Hellmuth, K.C., and T. C. Robinette, K.C., for the accused. J. R. Cartwright, K.C., and J. B. Clarke, K.C., for the Crown.

HEYNNEK v. SOVA—KELLY, J.—MAY 18.

*Fraud and Misrepresentation—Sale of Farm—Representations by Agents of Vendor—Responsibility of Vendor—Damages.*]—Action for damages for misrepresentation upon the sale by the defendant to the plaintiff of a farm in the township of Dover. The action was tried without a jury at Chatham. KELLY, J., read a judgment in which, after stating the facts and discussing the evidence, he stated his conclusion that the plaintiff had been induced to purchase the farm by false representations made to him by the defendant and his agents and representatives. The damages were assessed at $1,850, for which sum and costs judgment was directed to be entered in favour of the plaintiff against the defendant. R. L. Brackin, for the plaintiff. F. C. Kerby, for the defendant.

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RE NORTHERN QUARRIES LIMITED—MIDDLETON, J.—MAY 20.

*Company—Winding-up—Liquidator—Liability of, for Repayment of Sum Paid by Person Proposing to Purchase Portion of Assets—Leasehold Property—Payment Made to Landlord to Avoid Forfeiture—Action in Division Court—Res Judicata.*]—Appeal by Gibson Arnoldi & Co. from an order of the Master in Ordinary, in the course of a reference for the winding-up of a company, dismissing a motion by the applicant for a refund of $100 paid by him to the liquidator. The applicant desired to purchase leasehold property of the company in liquidation, and made an offer of $3,000, of which $300 was paid with the offer. The applicant asked for an extension of time for making the payments, and this was granted to him upon the understanding that he should pay $100 with which to meet a gale of rent due to the landlord, to prevent forfeiture. The $100 was paid to the liquidator and handed over to the landlord. The applicant was unable to complete the purchase, and the Master rejected his offer, but not until far more delay had occurred than had been contemplated. The $300 was refunded to the applicant. Before making any application in the liquidation proceedings, the applicant sued the liquidator in a Division Court for the $100, and failed there after a trial upon the merits. The liquidator had paid the $100 to the landlord and had no assets in his possession. The appeal was heard in the Weekly Court at Toronto. The learned Judge, in a written opinion, stated the facts and his conclusion thereon that there was no reason why the liquidator should be made personally liable for the $100, and no ground for saying that the Master was wrong. Appeal dismissed with costs. F. Arnoldi, K.C., for the applicant. W. B. Raymond, for the liquidator.

PEPPIATT v. REEDER—RIDDELL, J.—MAY 20.

*Damages—Deceit—Measure of Damages—Method of Estimating—Master's Report—Appeal—Reference back—Costs.*]—An appeal by the defendant from the report of the Master in Ordinary finding the plaintiff's damages at $2,929.12, with interest upon $1,000 (parcel thereof) at 3 per cent. from the 28th July, 1914, and upon the balance at 5 per cent. from the 13th March, 1915. Notes of previous decisions in the same case will be found in 8 O.W.N. 84, 257, 9 O.W.N. 121, 263. The present appeal was heard in the Weekly Court at Toronto. The learned Judge read a judgment in which he gave a full statement of the facts and history of the case. By an order made by MULOCK, C.J. Ex., on the 29th October, 1915 (9 O.W.N. 121), the Master's former report was set aside, and it was referred back to him to inquire, determine, and report the damages sustained by the plaintiff by reason of the false and fraudulent representations of the defendant, on the principle of allowing to the plaintiff the difference between the actual value of the chattels and lease at the date the transaction was entered into, namely, the 28th July, 1914, and the contract price as agreed upon between the parties on that day. The whole matter, the learned Judge said, seemed to him a simple one. The plaintiff was decieved into a bad bargain; he cannot get out of it—he must abide by it; but he is entitled to damages for deceit. Let the amounts he is to pay and be paid be determined just as though they were not between the same parties, and set off one against the other. The Master did not deal with the case in this view, and his report could not stand; the case should be referred back to him to determine the rights of the parties upon the principles indicated. The plaintiff should pay the costs of the appeal and of the proceedings on the reference except so far as these can be made available in the reference back. J. J. Gray, for the defendant. Edward Meek, K.C., for the plaintiff.

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## CORRECTION.

In BEST v. RENAUD, ante 248, change the word "redemption" in the head-lines and in the 3rd line of the judgment to "redemise."